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Family Law

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*The authors survey recent Florida cases*** and legislation in the field of domestic relations. Areas of emphasis include dissolution of marriage, alimony, and support and custody of children.*

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I. INTRODUCTION

Protection of the rights of children and equality of the sexes highlight recent judicial decisions in the field of family law. The Supreme Court of the United States has invalidated state legislation concerning alimony, paternity, adoption, and illegitimacy when founded on overbroad, gender-based distinctions. Florida courts have followed suit, rejecting outmoded sex-related stereotypes and presumptions in alimony and property matters. The courts have looked increasingly to the actual needs and contributions of both spouses. In the area of child custody, strict adherence to the sex-linked "tender years doctrine" has given way to a recognition that the child's welfare is best served by awarding custody to the nurturing, psychological parent, whether that be the mother or the father. In the same area, the Uniform Child Custody Jurisdiction Act, by discouraging child snatching and interstate compe-

tition, now permits Florida courts to adjudicate and enforce custody decrees that are truly in the best interests of the child.

II. MARRIAGE

In *In re Estate of Donner*,[1] a former spouse unsuccessfully challenged as fraudulent her ex-husband's subsequent marriage to another. The second marriage lasted only thirty-four days; during the honeymoon, the husband died of a heart attack. The court held that the duration of the marital relationship is irrelevant to a determination of its bona fide nature. The validity of a marriage depends on the fulfillment of the statutory requirements at its inception.

In *Metropolitan Dade County v. Shelton*,[2] the deputy clerk of the court had issued a marriage license two days after the performance of a ceremonial marriage. According to section 741.08 of the Florida Statutes, a ceremonial marriage performed without prior issuance of a marriage license is void.[3] But since the two-day gap between the ceremony and issuance of the license stemmed from the couple's good faith reliance on the deputy clerk's assurances, the marriage was upheld as substantially complying with the statute.

III. DISSOLUTION OF MARRIAGE

A. *Residency*

The husband-respondent in *Curran v. Curran*[4] failed to satisfy the residency requirement for bringing a suit for dissolution of marriage.[5] Respondent had never lived with his wife in Florida, lacked a Florida driver's license or any other indicia of residency, and at the time of trial was living abroad as a civilian. The District Court of Appeal, Fourth District, held that his stay of less than one year in Florida fifteen years earlier and his plan to return permanently to Florida upon retiring from the Army did not fulfill the statutory requirement of actual presence in the state for six months prior to filing, plus intent to remain indefinitely.

Proof of residency was also found lacking in *Gordon v.*

1. 364 So. 2d 742 (Fla. 3d DCA 1978).
2. 375 So. 2d 32 (Fla. 4th DCA 1979).
3. FLA. STAT. § 741.08 (1979).
4. 362 So. 2d 1042 (Fla. 4th DCA 1978).
5. FLA. STAT. § 61.021 (1979).

Gordon.[6] In that case, the petitioner was physically absent from the state with her serviceman husband for two and one-half years immediately prior to bringing suit for dissolution. Ms. Gordon had attended high school in Florida, was married and had lived in the state for over one year during marriage, was registered to vote, was licensed to drive, was possessed of personal belongings and a mailing address in the state, and had expressed an intention to reside permanently in Florida. Nevertheless, the District Court of Appeal, Fourth District, stressed the necessity for actual rather than constructive residence and reaffirmed the principle that a wife's residence remains that of her husband until she separates from the family.[7]

Once a petitioner has met the statutory residency requirement at the time of filing suit, however, a *subsequent* change of domicile prior to the final dissolution hearing does not divest the trial court of jurisdiction.[8]

B. *Venue*

The principle that a wife's domicile generally follows that of her husband when they reside together was relied on by the Third District, in reversing a change of venue from Dade to Escambia County.[9] The respondent wife had alleged that she was born and raised in Escambia County (Pensacola). She and her husband had married and resided there for about eight months before they left Florida and took up residence in North Carolina, where they lived for nearly three years. The husband then returned to Dade County, where he took up residence and filed for divorce, claiming his wife was still a resident of North Carolina. She, in an attempt to show that the service of process by publication was improper, alleged that she was a resident of Escambia County, pointing to her payment of a nonresident college fee to a North Carolina college and her possession of a Florida driver's license and voter registration. The district court held these factors insufficient evidence of Florida domicile, particularly since there was no demonstration of any place in the state where she could have been served personally. Since North Carolina was the last common residence of the

6. 369 So. 2d 421 (Fla. 3d DCA 1979).

7. In a perceptive dissent, Judge Barkdull challenged the conclusions of the majority as a denial to Ms. Gordon, wife of a military man, of benefits afforded to similarly situated military men under FLA. STAT. § 46.12 (1979). 369 So. 2d at 423 (Barkdull, J., dissenting).

8. Merritt v. Merritt, 369 So. 2d 1005 (Fla. 2d DCA 1979).

9. Bolles v. Bolles, 364 So. 2d 813 (Fla. 3d DCA 1978).

spouses, she would have had to reestablish her residence in Escambia County after her separation, to claim Florida resident status.

In *Hoskins v. Hoskins*,[10] a husband's occasional weekend visits to his wife's separate apartment, which had been leased by him, did not render the estranged spouses residents with the common intent of remaining married. Since venue is proper not where the breach occurred, but where the parties last resided together with the intention of remaining married,[11] the trial court properly denied a motion to change venue to the county in which the wife's apartment was located.

C. *Amendment of Petition*

In *Talbert v. Talbert*,[12] a spouse who had obtained two previous continuances did not seek to amend her answer until eight days before trial. Since the absence of her husband's counsel had prompted the initial continuances, however, and since the alimony, special equity, and child support relief which she sought were vital to her and her children, leave to amend was granted on appeal.

D. *Discovery*

The trial court improperly ordered a husband to undergo a compulsory mental and physical examination in *Paul v. Paul*,[13] in which the wife's petition had asserted that he was "a person of unstable neurological background, is incompetent and mentally deranged."[14] Given the conclusory nature of the wife's allegation, the requirement of rule 1.360(a) of the Florida Rules of Civil Procedure[15] that mental condition must be "in controversy" before a spouse need submit to such an examination was not satisfied.

E. *Separate Maintenance*

In a dissolution proceeding initiated by the husband, the wife counterclaimed for separate maintenance under section 61.09 of the Florida Statutes.[16] The trial court dismissed the counterclaim

10. 363 So. 2d 179 (Fla. 4th DCA 1978).
11. *Id. See also* Tokan v. Tokan, 373 So. 2d 955 (Fla. 3d DCA 1979).
12. 364 So. 2d 541 (Fla. 4th DCA 1978).
13. 366 So. 2d 853 (Fla. 3d DCA 1979).
14. *Id.* at 854.
15. FLA. R. CIV. P. 1.360(a).
16. Weinschel v. Weinschel, 368 So. 2d 386 (Fla. 3d DCA 1979).

after finding that the wife was an out-of-state resident who without good cause had abandoned her husband to come to Florida. Reversing the dismissal, the appellate court held that for a party to obtain an award of separate maintenance, it is not essential that the marital domicile be in Florida or that the separation be the fault of the party against whom suit is brought. A contrary rule would mean that nonresident spouses and children might become public charges in Florida.[17]

F. *Establishment of Foreign Divorce Decree*

The district court in *Yoder v. Yoder*[18] affirmed the trial court's ruling that a proceeding to establish and enforce the provisions of a Texas divorce decree was neither an independent action for child support, nor an action to dissolve marriage. Consequently, personal jurisdiction over the nonresident former spouse could not be acquired by service pursuant to the Florida long arm statute governing actions for alimony, child support, or property. Thus, a money decree could be established against the defendant only by his appearing, answering, or returning to Florida.

IV. ALIMONY

A. *Jurisdiction*

When alimony was not requested at the final hearing of dissolution and both spouses were employed, a wife was foreclosed from raising the issue of alimony on appeal.[19]

A trial court may not award permanent alimony when it has been neither sought in the pleadings nor tried "by express or implied consent of the parties,"[20] pursuant to rule 1.190(b) of the Florida Rules of Civil Procedure.[21]

B. *Discovery*

Although conduct sometimes may be a factor in determining the amount of an alimony award, the District Court of Appeal, Second District, held that once a husband has admitted his ability to pay alimony, questions asked of a nonparty concerning her ex-

17. *Id.* at 387.
18. 363 So. 2d 409 (Fla. 1st DCA 1978).
19. Laws v. Laws, 364 So. 2d 788 (Fla. 4th DCA 1978).
20. James v. James, 374 So. 2d 1085 (Fla. 5th DCA 1979).
21. FLA. R. CIV. P. 1.190(b).

tramarital conduct with the spouse and *her* independent income are not reasonably calculated to obtain information concerning the extent of the *husband's* ability to pay.[22] In this case, the trial court had ordered the husband's nurse to answer interrogatories propounded by the wife regarding her sexual relationship with the husband. The Second District vacated the order of the lower court, stating that although discovery concerning the *extent* of a husband's ability to pay is legitimate, questions asked of a nurse concerning her conduct with him are not relevant to the point in issue.

C. *Criteria*

1. CASE LAW

In *Orr v. Orr*,[23] the Supreme Court of the United States invalidated a Georgia statute permitting only wives to receive alimony. Despite a purportedly benign purpose of compensating women for past marital discrimination, the gender-based classification denied equal protection. The Court reasoned that by equating the sex of a spouse with financial need, the scheme both denied compensation to truly needy husbands and perpetuated an outmoded stereotype of women as dependent.[24]

Following the principle of *Orr*, the District Court of Appeal, Fourth District, found that a permanently and totally disabled husband had a right to an award of permanent alimony.[25]

Conduct of the parties may also affect the determination of alimony. Adultery, for example, may be a mitigating factor in fixing the amount of alimony awarded the adulterous party.[26] While concurring with the Third District's reaffirmance of this settled rule,[27] Judge Schwartz illuminated its place within the context of the current no-fault law. Adultery may form the basis for decrease in alimony not because the trial court wishes to punish a party for misconduct, but because the adultery has directly caused the irretrievable breakup.[28] Likewise, as extramarital sexual conduct analogous to heterosexual adultery, a wife's lesbian relationship may be considered to decrease her alimony award.[29]

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22. Joldersma v. Stewart, 370 So. 2d 80 (Fla. 2d DCA 1979).
23. 440 U.S. 268 (1979).
24. *Id.* at 280-82.
25. Connor v. Connor, 372 So. 2d 130 (Fla. 4th DCA 1979).
26. FLA. STAT. § 61.08(1) (1979).
27. Martin v. Martin, 366 So. 2d 475 (Fla. 3d DCA 1979).
28. *Id.* at 475.
29. Patin v. Patin, 371 So. 2d 682 (Fla. 4th DCA 1979).

Other marital misconduct, if it results in strained economic circumstances for the "innocent" party, may be considered in fixing an alimony award. In *Williamson v. Williamson*,[30] the Supreme Court of Florida reaffirmed the clean hands doctrine expressed in section 61.08(2) of the Florida Statutes. The doctrine permits the trial court to consider "any factor to do justice and equity to the parties."[31] Mr. Williamson's abandonment of his wife, taking with him the family savings, and his refusal to reconcile, despite her willingness, resulted in his wife's poor economic situation. Since any monetary award would have caused both parties to suffer financially, the supreme court held that the husband's misconduct precipitating the wife's economic difficulties was an "equitable circumstance"[32] that could be considered in assessing alimony.

The trial court in *Phillips v. Phillips*[33] relied upon an incentive criterion in providing for increased alimony in the event the wife obtained employment. Because payment of alimony must be based on the awarded spouse's need, as well as the provider's ability to pay, however, the trial court's reliance on the incentive criterion rendered the award improper.[34]

2. LEGISLATION

By express statutory amendment, economic factors relevant to a determination of alimony include:

> (a) The standard of living established during the marriage.
> (b) The duration of the marriage.
> (c) The age and the physical and emotional condition of both parties.
> (d) The financial resources of each party.
> (e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.
> (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education and career building of the other party.[35]

Thus, the new amendment allows more discretion to the court to

30. 367 So. 2d 1016 (Fla. 1979).
31. FLA. STAT. § 61.08(2) (1979).
32. 367 So. 2d at 1019.
33. 372 So. 2d 199 (Fla. 1st DCA 1979).
34. *Id.* at 200.
35. FLA. STAT. § 61.08(2) (1979).

consider all relevant facts and circumstances before awarding alimony. In addition, the amended statute does not bar alimony to an adulterous wife automatically as was previously the case.[36]

D. *Rehabilitative Alimony*

The District Court of Appeal, First District, struck down a twenty-year award of rehabilitative alimony to a healthy and skilled wife.[37] The court found the award counterproductive in view of the central purpose of rehabilitative alimony, which is to provide a spouse incentive to regain skills leading to eventual self-support.

On similar grounds, the Fourth District reversed a five-year rehabilitative award, finding no evidence that the wife's ability to support herself would alter after that time.[38] The same court reduced an award of rehabilitative alimony for an extended period to two years, since the need for only two years of nursing education had been demonstrated.[39]

In view of the short term of the marriage—seven months—and the wife's ability to support herself, the Fourth District reduced an award of rehabilitative alimony from four years to six months or the time the wife received her college degree, whichever came first.[40]

In *Nicholson v. Nicholson*,[41] a rehabilitative award that left the paying spouse with $10.50 per week to live on was held to be reversible error. Since the wife possessed substantial assets, consisting of equity in the marital home and title to other real property, she could not receive any rehabilitative alimony.

Yet, even where a spouse's need is adequately demonstrated, an award in excess of the other party's net income at the time of dissolution or one which compels the paying spouse to seek additional employment is an abuse of discretion.[42] A combined award of alimony and child support amounting to less than one-half the amount necessary to maintain the family's shared standard of living and failing to include the wife's retraining expenses, however,

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36. *Id. See also* notes 26-28 & 30-32 and accompanying text *supra*.
37. Robinson v. Robinson, 366 So. 2d 1210 (Fla. 1st DCA 1979).
38. Rickling v. Rickling, 364 So. 2d 516 (Fla. 4th DCA 1978).
39. Hunter v. Hunter, 368 So. 2d 627 (Fla. 4th DCA 1979).
40. Murray v. Murray, 374 So. 2d 622 (Fla. 4th DCA 1979).
41. 372 So. 2d 178 (Fla. 2d DCA 1979).
42. Kuntz v. Kuntz, 370 So. 2d 1216 (Fla. 3d DCA 1979).

has been reversed as insufficient.[43]

In *Ciraco v. Ciraco*,[44] the long term nature of the marriage—twenty-four years; the wife's age—forty-two; her poor health and limited education, job experience, and skills established the need for permanent rather than rehabilitative alimony. The husband's yearly income of $23,000 demonstrated his ability to provide for her.

On parallel facts, the Second District reversed an award of rehabilitative alimony on dissolution of a thirty-two year marriage.[45] Lacking job training or experience, as well as any education beyond high school, the fifty-six-year-old wife had little potential for effective rehabilitation. In view of her retired husband's receipt of a military pension, he should have been required to pay her permanent alimony.

By contrast, a thirty-six-year-old wife with excellent health, work experience as both a licensed school teacher and licensed real estate broker, and possession of the parties' valuable marital home was entitled only to rehabilitative rather than permanent alimony.[46] Similarly, a wife who possessed a master's degree in social work and earned $8,000 as a university professor was properly awarded rehabilitative rather than permanent alimony.[47] When, however, physical and emotional illnesses of the parties' children made it impossible for the wife to work full time, she was entitled to permanent alimony.[48]

In *Hall v. Hall*,[49] the Second District affirmed an award of rehabilitative alimony, despite the fact that the parties had planned for the wife to remain at home to care for the children and that her retraining entailed leaving them to commute to a distant city. Since the wife was thirty-eight years of age, had some teaching experience and needed only a Florida certificate to teach in the state, the court found no abuse of discretion in failing to award permanent alimony.

By contrast, the First District in *Bender v. Bender*[50] upheld an award of permanent alimony in an effort to preserve the parties' plan that the wife remain at home as a full-time mother. Since the

43. Hall v. Hall, 363 So. 2d 137 (Fla. 3d DCA 1978).
44. 363 So. 2d 53 (Fla. 3d DCA 1978).
45. Sullivan v. Sullivan, 363 So. 2d 393 (Fla. 2d DCA 1978).
46. Nott v. Nott, 368 So. 2d 669 (Fla. 3d DCA 1979).
47. Eichenbaum v. Eichenbaum, 372 So. 2d 509 (Fla. 3d DCA 1979).
48. Weeks v. Weeks, 363 So. 2d 602 (Fla. 4th DCA 1978).
49. 363 So. 2d 137 (Fla. 3d DCA 1978).
50. 363 So. 2d 844 (Fla. 1st DCA 1978).

court agreed with the trial court's reasoning that dissolution does not end the decision of the parties regarding child rearing,[51] Ms. Bender could not be required to return to work as a secretary. The husband's substantial yearly income of over $100,000 demonstrated his clear ability to provide permanent alimony of $2,500 a month.

In upholding an award of permanent alimony to a wife already possessed of a teaching certificate and part-time employment,[52] the Second District applied a seemingly less stringent standard than it had applied in *Hall*.[53] Prompting the affirmance was the court's concern that even were the wife to obtain a full-time teaching position, her standard of living would still remain considerably less than what she had enjoyed during marriage.

The "fabulously wealthy" lifestyle of the parties in *Lutgert v. Lutgert*[54] supported an award of permanent rather than rehabilitative alimony. Although the wife, over fifty years of age at the time of dissolution, had not worked full time for thirty years, she did possess a real estate license. Given her husband's assets of approximately $25,000,000, however, her potential earnings in real estate could not possibly reach the high level of income which she had enjoyed while married.

E. *Permanent Alimony*

In *Cyphers v. Cyphers*,[55] the Second District upheld an award of permanent alimony to a spouse who had worked as a housewife during most of the thirty-six-year marriage and who, upon divorce, would lose benefits which would otherwise accrue to her as the wife of a retired military man. During the last years of her marriage, the wife had operated a dress shop. Because it was an unprofitable business whose future success was uncertain, however, an award of permanent alimony was warranted.

F. *Modification*

In *Frizzell v. Bartley*,[56] respondent had sought modification of the alimony and child support provisions of an agreement between

51. *Id.* at 845.
52. Thomas v. Thomas, 364 So. 2d 78 (Fla. 2d DCA 1978).
53. *See* note 49 and accompanying text *supra*.
54. 362 So. 2d 58 (Fla. 2d DCA 1978).
55. 373 So. 2d 442 (Fla. 2d DCA 1979).
56. 372 So. 2d 1371 (Fla. 1979).

the spouses which had not been incorporated into the final judgment. The trial court held that section 61.14 of the Florida Statutes,[57] authorizing judicial modification of alimony and support provisions, impairs private contract in violation of the state and federal constitutions.[58] The Supreme Court of Florida reversed, upholding the constitutionality of the statute. At the time the parties concluded their agreement on alimony and child support, the statute allowing modification had existed some twenty-seven years. The court reasoned that all state legislation on the subject, including section 61.14, had been incorporated into the contract terms. Thus, present modification of the agreement pursuant to section 61.14 did not constitute an impairment of the contract's obligations.[59]

Where a spouse is held in contempt for nonpayment of alimony, the doctrine of clean hands proscribes the court from simultaneously modifying alimony payments.[60]

In *Langstaff v. Langstaff*,[61] the Fourth District struck a provision for reduction of periodic alimony upon sale of the parties' marital home. Since the awarded wife would have to seek another residence after the sale, her financial needs would remain the same. The court therefore felt the sale would not constitute a substantial change justifying the automatic modification.

Similarly improper is a stipulation for increase in child support upon termination of rehabilitative alimony.[62] The Fourth District perceived the predetermined increase as demonstrating a need of the custodial spouse for additional support in the form of permanent alimony.

Other recent cases have held as follows:

Section 61.14 permits modification only on the basis of changed circumstances. Once the court has ordered modification, it may not reexamine the same circumstances for the purpose of further modification.[63]

A spouse's bare assertion of future reduction in income does not justify denial of permanent alimony, where the need for continued support has been demonstrated.[64]

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57. FLA. STAT. § 61.14 (1979).
58. U.S. CONST. art. 1, § 10; FLA. CONST. art. 1, § 10.
59. 372 So. 2d at 1372.
60. Mayer v. Mayer, 373 So. 2d 931 (Fla. 3d DCA 1979).
61. 363 So. 2d 399 (Fla. 4th DCA 1978).
62. Kvittem v. Kvittem, 365 So. 2d 791 (Fla. 4th DCA 1978).
63. Hosford v. Hosford, 362 So. 2d 973 (Fla. 1st DCA 1978).
64. Tierney v. Tierney, 368 So. 2d 111 (Fla. 4th DCA 1979).

In another case, the ex-wife secured an increase in alimony. The District Court of Appeal, First District, noted that the income of the ex-husband's new spouse could not be a basis for a modification of an alimony award, but upheld the increase in this case because the ex-husband's income had grown independently of his new marriage.[65]

While loss of purchasing power of the dollar is a proper element for consideration in modifying alimony, it is insufficient, by itself, to support an increase.[66]

Incarceration of the spouse paying alimony is not a material change justifying temporary suspension of alimony obligations.[67]

Where the custodial spouse has failed to challenge child visitation terms at trial or on appeal, his or her subsequent failure to comply with rights granted is a material change in circumstances warranting suspension of alimony.[68]

G. *Enforcement*

The trial court has discretion to secure payment of alimony and child support (on which substantial arrearages existed at the time of final judgment) through imposition of a lien against the recalcitrant spouse's real property.[69]

H. *Lump Sum Alimony*

1. JURISDICTION

The trial court retains authority to award lump sum alimony regardless of whether the pleadings have specifically sought such alimony.[70]

2. CRITERIA

Lump sum alimony may not be awarded unless the provider has economic ability to pay. Further, a reasonable purpose and special circumstances must exist to justify the award.[71] Thus, in a situation where the wife would have benefitted equally from an award of permanent alimony, a lump sum award of a husband's

65. Harville v. Harville, 369 So. 2d 377 (Fla. 1st DCA 1979).
66. Greene v. Greene, 372 So. 2d 189 (Fla. 3d DCA 1979).
67. Tompkins v. Tompkins, 362 So. 2d 689 (Fla. 1st DCA 1978).
68. Gordon v. Gordon, 368 So. 2d 1356 (Fla. 4th DCA 1979).
69. Adler v. Adler, 362 So. 2d 468 (Fla. 3d DCA 1978).
70. Caidin v. Caidin, 367 So. 2d 248 (Fla. 3d DCA 1979).
71. Riscile v. Riscile, 370 So. 2d 819 (Fla. 2d DCA 1979).

interest in a liquor license was stricken since it would have served only to hurt the husband economically.[72]

A special equity justifying an award of lump sum alimony differs from that necessary to establish a claim to personal property. For instance, in *Caidin v. Caidin*[73] a wife's employment as a therapist technician, necessitated by the husband's illness during the marriage, constituted a "special equity" supporting her award of lump sum alimony.

In a long term marriage, a wife's sacrifice of career to remain at home also may justify an award of lump sum alimony. In *Eddy v. Eddy*,[74] the First District held insufficient an award of lump sum alimony in the amount of $75,000 to be paid periodically over seventeen years. The wife was married at sixteen, lacked a high school diploma, and had limited work experience outside the home. Citing to *Douglas v. Douglas*,[75] the district court held that the wife should receive additional lump sum alimony.

In contrast, the district court in *Lee v. Lee*[76] found no special equity in the fact that the wife had worked in her husband's business. The trial court had awarded the wife lump sum alimony consisting of all her husband's assets except for a ski school business. On appeal, the court noted that the husband frequently had worked at two jobs during the marriage and that such an award would cause "a shocking change in [his] financial condition."[77] Under these circumstances, the court felt that lump sum alimony was inappropriate.

A lump sum award of an automobile to a spouse was valid in view of the party's special need for it to provide a means of transportation to work.[78]

The questions of lump sum alimony, permanent periodic alimony, and "special equity" were clarified recently by the Supreme Court of Florida in *Canakaris v. Canakaris*[79] in a way that should affect all future decisions on lump sum alimony. In *Canakaris*, the wife had been awarded lump sum alimony consisting of $50,000 in cash and the husband's interest in their jointly owned residence, plus $500 per week permanent periodic alimony and one of the

72. *Id.*
73. 367 So. 2d 248 (Fla. 3d DCA 1979).
74. 366 So. 2d 49 (Fla. 1st DCA 1978).
75. 361 So. 2d 212, 214 (Fla. 2d DCA 1978).
76. 365 So. 2d 742 (Fla. 4th DCA 1978).
77. *Id.* at 743.
78. Cypher v. Cypher, 373 So. 2d 442 (Fla. 2d DCA 1979).
79. 382 So. 2d 1197 (Fla. 1980); *see* note 99 *infra*.

family automobiles. She also retained her individual one-half interest in hospital realty held as a tenancy by the entireties. The supreme court held, among other things, that the award of the husband's interest in the marital home was improper since she lacked a "special equity" in it.

The court said that the term "special equity" should not be used in connection with lump sum alimony, but should be used to describe only those situations involving "a vested interest in property brought into marriage or acquired during the marriage because of contribution of funds or services over and above normal marital duties."[80] Such an interest is *not* alimony. Lump sum alimony depends not on a finding of a prior vested right, but on a consideration of all relevant circumstances to ensure an equitable distribution of property acquired during the marriage.[81] Once granted, the award becomes a vested right which is not terminable upon a spouse's remarriage or death, unlike permanent periodic alimony, which is so terminable.[82] A trial judge possesses broad discretion to award lump sum alimony, and his decision cannot be overturned if it meets the test of "reasonableness." Basically, such an award may be made when the evidence shows (1) a justification for such lump sum payment, and (2) the financial ability of the other spouse to make such payment without substantially endangering his or her economic status.[83] In the instant case, the supreme court held that the trial court had not abused its discretion in awarding the husband's interest in the residence as lump sum alimony.

3. MODIFICATION

Once awarded, lump sum alimony creates a vested property settlement which may not be modified.[84] In *Benson v. Benson*,[85] a property settlement agreement incorporated into a final dissolution judgment called for lump sum alimony payable in installments. The husband petitioned for extension of the pay schedule, asserting changed financial conditions. Since parties have the right to rely on their original property agreement, the petition was untenable.

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80. *Id.* at 1200.
81. *Id.* at 1201.
82. *Id.*
83. *Id.*
84. Goldman v. Goldman, 362 So. 2d 389 (Fla. 3d DCA 1978).
85. 369 So. 2d 99 (Fla. 4th DCA 1979).

4. MARITAL HOME

In *Simpson v. Simpson*,[86] the District Court of Appeal, Fourth District, held that an award as lump sum alimony of a marital home owned as a tenancy by the entireties was improper absent a showing of positive necessity by the awarded spouse. Since the spouse needed only provision of a home in which to reside, granting exclusive possession or, alternatively, increasing permanent alimony, would have sufficed.

In *Reid v. Reid*,[87] the Fourth District reversed an award of the marital home in the form of lump sum alimony as an impermissible attempt by the trial court to make a property settlement for the hostile spouses. Each party had been awarded custody of one child, no mortgage encumbered the property, the contributions of each to the home were not disproportionate, and both were employed. Thus, the wife lacked any special equity in the home. The contention that the parties were too hostile toward each other to own property jointly offered insufficient reason to award the home to the wife as lump sum alimony.[88]

In *Mitchell v. Mitchell*,[89] the trial court held that the wife's work and help in paying the mortgage during the three-year marriage were nonrecoverable contributions to the marriage. The Fourth District upheld the finding of no special equity in the marital partners' home, on the grounds that the house was purchased prior to the marriage with the husband's money and title was in the husband's name alone.

Similarly, the supreme court in *Ingram v. Ingram*[90] upheld the trial court's discretion in rejecting the husband's contentions that his contributions towards payment of the mortgage and home improvements during the eight year marriage created a special equity in the marital home in his favor. The wife had bought the home ten months before the marriage. The court noted, however, that the trial judge did not lack discretionary authority to find such an equity in the husband, should it have been necessary to do equity between the parties.[91]

The Supreme Court of Florida has held that when a spouse's need is demonstrated, exclusive possession of the marital home

86. 372 So. 2d 526 (Fla. 4th DCA 1979).
87. 365 So. 2d 1050 (Fla. 4th DCA 1978).
88. *Id.* at 1051.
89. 368 So. 2d 628 (Fla. 4th DCA 1979).
90. 379 So. 2d 955 (Fla. 1980).
91. *Id.* at 956.

may be awarded not only as lump sum alimony or as part of a child support obligation, but as a form of rehabilitative alimony.[92] In *McDonald v. McDonald*[93] the court found that the limited education and skills of the wife in a twenty-two-year marriage demonstrated her need, even though the children were grown and the award was neither in the form of lump sum alimony nor in the form of child support.

In a similar case involving award to the husband of temporary, exclusive use of jointly held property occupied by the husband's parents, the supreme court rejected a finding that the husband had a special equity in the property, but concurred in the award of exclusive possession.[94] The trial court based its finding of a special equity on the husband's significant contributions in acquiring and improving the property. Citing *Ball v. Ball*,[95] the supreme court held that a vested special equity does not arise "when property is acquired from funds generated by a working spouse while the other spouse performed normal household and child-rearing responsibilities."[96] Since the critical question in the award of exclusive possession, however, is simply whether the award is equitable, the trial court, without a finding of such special equity, could make a discretionary grant of such possession. The court agreed that in this case there was a demonstrated need for exclusive possession to assure the husband's fiscal ability to provide support for the wife and minor children.[97]

In another case, an order to sell the marital home within six months of the final judgment with an accompanying limitation of the wife's and children's possession of the home to the six-month period, was improper on two grounds. First, there had been no formal pleadings requesting partition. Additionally, the wife was entitled to occupancy of the house formerly held as tenancy by the entireties for as long as she remained unmarried and had minor children.[98]

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92. McDonald v. McDonald, 368 So. 2d 1283 (Fla. 1979).

93. *Id.*

94. Duncan v. Duncan, 379 So. 2d 949 (Fla. 1980).

95. 335 So. 2d 5 (Fla. 1976).

96. 379 So. 2d at 952.

97. *Id.* at 953.

98. Bianchini v. Bianchini, 374 So. 2d 620 (Fla. 4th DCA 1979).

V. PROPERTY RIGHTS

A. *Real Property*

1. JURISDICTION

General reservation of jurisdiction in a final judgment of dissolution preserves the trial court's authority to enforce the property rights determined therein. It will not support alteration of the original order by directing a contradictory partition of property.[99]

Accordingly, the District Court of Appeal, Third District, held that the trial court in *Gutjahr v. Gutjahr*,[100] had authority to declare the wife owner of securities which had been pledged for a loan. Since the final judgment required the husband to return the securities to his wife, the trial court's subsequent declaration was not a contradictory disposition of property rights or a reconsideration of obligations previously determined, but rather a proper enforcement measure.

In *Poling v. Tresidder*,[101] the final judgment of dissolution had awarded the husband exclusive possession of the marital home as long as he lived in it, with proceeds to be divided equally upon sale. The husband later petitioned the trial court to determine his interests in the tenancy in common, including credit for improvement expenses. Since the original judgment failed to reserve jurisdiction, the trial court lacked authority to hear the husband's petition.

Special equity may not be awarded without specification of the res to which the equity is attached and record support of contributions to that res.[102] In *Parra v. Parra*,[103] petitioner unsuccessfully sought enforcement of a court order awarding her a special equity in her husband's land, located in North Carolina. The original order, however, failed to provide a legal description of the property, to require conveyance, or to fix a time for performance. Consequently, although the trial court possessed jurisdiction over the parties, it lacked jurisdiction over the real property and could

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99. Mason v. Mason, 371 So. 2d 226 (Fla. 2d DCA 1979). The following discussion of property rights reflects the state of Florida law prior to the recent supreme court decisions in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), and Duncan v. Duncan, 379 So. 2d 949 (Fla. 1980). For a fuller discussion of the impact of these important cases, see the forthcoming casenote on *Canakaris* in 34 U. MIAMI L. REV. ___ (Sept. 1980).

100. 368 So. 2d 93 (Fla. 3d DCA 1979).

101. 373 So. 2d 405 (Fla. 4th DCA 1979).

102. Veiner v. Veiner, 364 So. 2d 834 (Fla. 3d DCA 1978).

103. 362 So. 2d 380 (Fla. 1st DCA 1978).

not enforce conveyance.

The court's reluctance to make property agreements for the parties extends to partition of the parties' marital home and division of personal property therein. Chapter 64 of the Florida Statutes provides for judicial sale of a marital residence only after the parties have failed to sell the home themselves by a reasonable deadline.[104] Thus, in *Sullivan v. Sullivan*,[105] the court lacked authority to sell the home owned as a tenancy by the entireties and to divide the proceeds equally because the judgment had failed to set a deadline for sale of the home by the parties. Likewise, the court's failure to set a date for sale of the personal property and furnishings rendered ineffectual the court-ordered provision. Absent proper pleadings in accordance with chapter 64 of the Florida Statutes, the court may not order partition of real property which is not sold within ninety days.[106]

2. APPLICATION OF FOREIGN LAW

A trial court may not, sua sponte, apply foreign law in property proceedings. In order to ensure the parties full opportunity to address the issue, foreign law may be relied upon only where raised in the pleadings by the parties themselves.[107]

3. SPECIAL EQUITY DOCTRINE

In the disposition of real property, record title prevails, absent a showing of special equity consisting of a contribution of financial or personal services. Although there is no longer a presumption of donative intent, a showing by the preponderance of evidence that conveyance of real property was intended as a gift will rebut an assertion of special equity.[108] In *Laws v. Laws*[109] the wife claimed a special equity in real property because she had acquired it in a property settlement prior to her present marriage. She denied any donative intent in the conveyance of the property to herself and her husband, thereby creating a tenancy by the entireties. The court found this "bald assertion"[110] inadequate and held that a preponderance of evidence proved the requisite intent to make a

104. FLA. STAT. §§ 64.011-.091 (1979).
105. 363 So. 2d 393 (Fla. 2d DCA 1978).
106. Guy v. Guy, 364 So. 2d 70 (Fla. 4th DCA 1978).
107. Schubot v. Schubot, 363 So. 2d 841 (Fla. 4th DCA 1978).
108. Laws v. Laws, 364 So. 2d 798 (Fla. 4th DCA 1978).
109. *Id.*
110. *Id.* at 801.

gift of the property to her husband. The evidence included the documentary evidence of the warranty deed and the wife's execution of a will at the same time that left the property to her husband.

In *Parramore v. Parramore*,[111] the husband conveyed to his wife and himself land acquired by him prior to marriage. Since at the time of the deed's execution state law presumed a gift of the entireties' interest, the husband was not entitled to a special equity in the property.

Petitioner's contribution towards payment for the parties' real property both before and after separation of the spouses, in addition to the admission by her husband that he considered petitioner to be part owner, established her right to special equity in the property.[112]

In *Forehand v. Forehand*,[113] petitioner had a right to special equity in the marital home originally titled in her name and acquired by her prior to marriage. Although title was transferred by her to a tenancy by the entireties in an effort to obtain a mortgage loan, no intention to make a gift was found. The husband was entitled to a special equity as well, however, since he had used over $5,000 which he had acquired prior to marriage, to make home improvements. Thus, the trial court erred in failing to recognize the husband's special equity and in awarding the full and complete ownership of the home.[114]

In *Sanders v. Sanders*,[115] the First District modified petitioner's award of the parties' marital home as a special equity. During marriage, the wife had sold a home which she had owned prior to the marriage and contributed $3,000 of the proceeds towards the parties' jointly owned marital home. The husband, however, had asserted that he had paid $4,700 of his inheritance to make home improvements. Although the trial court's factual findings had accepted the wife's version over that of the husband's, the First District nevertheless reduced the wife's special equity to a $3,000 interest in the home.

In *Tinsley v. Bonner*,[116] the Third District upheld an award to the husband of the parties' former residence and a grant to the

111. 368 So. 2d 1308 (Fla. 1st DCA 1978).
112. Johnson v. Johnson, 367 So. 2d 695 (Fla. 2d DCA 1979).
113. 363 So. 2d 829 (Fla. 1st DCA 1978).
114. *Id.* at 832.
115. 362 So. 2d 284 (Fla. 1st DCA 1978).
116. 362 So. 2d 975 (Fla. 3d DCA 1978).

wife of her husband's interest in other property. The husband had acquired the home prior to marriage and had transferred title to both parties in exchange for a deed to his wife's individually owned home. The wife had challenged the court's ability to change title, but the awards were affirmed because of the trial court's finding of a special equity in her husband's favor. Moreover, since the wife had fully litigated the issue of title, she was not allowed on appeal to challenge the authority of the trial court to adjudicate the matter.[117]

4. CONTEMPT

In *Kilmark v. Kilmark*,[118] a property settlement agreement incorporated into a final judgment provided for alimony and child support payments. The husband contended that the agreement was one to pay alimony and sought modification under rule 1.540 of the Florida Rules of Civil Procedure.[119] The trial court upheld the agreement as a nonmodifiable property settlement. Subsequently, the parties filed a joint stipulation and a rule 1.540 motion to alter the first judge's ruling, pursuant to which the alimony payments were modified. Upon the husband's failure to pay the modified award, the wife successfully petitioned for contempt. The husband challenged the contempt order as void for lack of jurisdiction. Relying on the trial court's initial determination, he asserted that as a property agreement its provisions were unenforceable by contempt. On appeal, the Second District found that under rule 1.540 the second judge possessed subject matter jurisdiction to hear the joint motion for modification. Since the husband was estopped from challenging the order that he had sought, the contempt order was upheld.[120]

A husband's failure to pay one-half the expenses, consisting of mortgage payments, taxes, and repairs owed on property held as a tenancy in common supported a judgment of contempt.[121] The case was remanded to determine whether the husband's allegation of his wife's willfulness in blocking sale of the home as ordered under the final judgment supported imposition of sanctions upon her as

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117. *Id.* at 978.

118. 366 So. 2d 794 (Fla. 2d DCA 1978).

119. FLA. R. CIV. P. 1.540. Among other things, rule 1.540 permits relief from judgments, decrees or orders in which there are clerical mistakes arising from oversight or omission.

120. 366 So. 2d at 797.

121. Gainsborg v. Gainsborg, 362 So. 2d 1028 (Fla. 3d DCA 1978).

well.[122]

A contempt order also was upheld for a wife's failure to sell property as stipulated in the property settlement agreement incorporated into the final judgment of dissolution.[123] A contempt order is unsupportable, however, where no affirmative finding exists as to the spouse's ability to comply and willful failure to do so.[124]

5. MORTGAGE CREDIT

A spouse who pays mortgage, taxes, insurance, and other expenses on a jointly owned marital home of which she has been awarded possession for the duration of the children's minority is entitled to credit against her former husband's proceeds upon sale of the home.[125] The court may not require a party to increase a former spouse's equity by making unreimbursed payments such as these.

B. *Personal Property*

In a case in which the husband appealed a distribution of joint assets as inequitable, the distribution was upheld. Since the wife had furnished all assets and living expenses of the marriage and the husband's sole contribution was his management of them, the distribution was not inequitable to him, and the trial court did not abuse its discretion.[126]

C. *Special Equity Doctrine*

In *Snider v. Snider*,[127] the Third District rejected a husband's claim of special equity in notes and mortgages held jointly by the spouses. By paying family expenses during the marriage, the wife had enabled her husband to make valuable real estate investments and thus had contributed towards creation of the notes. Rejecting the husband's assertion that he had placed the notes in joint names for survivorship purposes only, the Third District upheld the finding of donative intent on his part.

A wife's claim to diamonds given her as a gift by her husband

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122. *Id.* at 1029.
123. Firestone v. Ferguson, 372 So. 2d 490 (Fla. 3d DCA 1979).
124. *See, e.g.*, Murphy v. Murphy, 370 So. 2d 403, 409 (Fla. 3d DCA 1979).
125. Rubino v. Rubino, 372 So. 2d 539 (Fla. 1st DCA 1979).
126. Ritter v. Ritter, 362 So. 2d 384 (Fla. 3d DCA 1978) (per curiam).
127. 371 So. 2d 1056 (Fla. 3d DCA 1979).

was rejected in *Winner v. Winner.*[128] Since the diamonds were at all times located in an out-of-state bank (pledged as security for a loan), the wife failed to prove the essential element of donative intent, actual or constructive delivery.

The Second District reversed an award of jointly owned furnishings to a wife, because the pleadings failed to seek partition as outlined in chapter 64 of the Florida Statutes (1977) and special equity was neither claimed nor demonstrated.[129]

In *Murphy v. Murphy,*[130] the trial court awarded respondent a special equity in real and personal property held in her husband's name. Although respondent had paid for the property with money unconnected with the marriage, she had made her husband joint owner at his insistence. Noting that contractual interpretation is usually a matter for the trial court, the Third District rejected petitioner's assertion that the conveyances constituted a postnuptial property settlement agreement binding upon the court.[131] The equities as found by the trial court were compelling:

> [T]he equities . . . are with the Wife . . . . The Husband chose to live on the monies received by the Wife . . . . The Husband will leave this marriage . . . better off financially than when he entered it . . . . Upon dissolution, this Court sees no reason to extend a lifetime of ease which he has done so little to earn.[132]

In another case, a husband unsuccessfully challenged his wife's entitlement to a one-half interest in the parties' jointly held securities.[133] No special equity existed to overcome record title since the securities were not purchased from sources unconnected with the marriage. The court did not accord credibility to the husband's claim that placement of title in both names resulted from a mistake on the part of his brokers.

The Second District has extended to personal property the principle of *Ball v. Ball,*[134] which abolished any presumpton of gift in the supply of jointly held real property from a source unconnected to the marriage. Following *Ball,* the court in *Lawless v. Lawless*[135] concluded that if each spouse had placed funds from

128. 370 So. 2d 845 (Fla. 3d DCA 1979).
129. Cyphers v. Cyphers, 373 So. 2d 443, 445 (Fla. 2d DCA 1979).
130. 370 So. 2d 403 (Fla. 3d DCA 1979).
131. *Id.* at 407.
132. *Id.* at 405.
133. Genoe v. Genoe, 373 So. 2d 940 (Fla. 4th DCA 1979).
134. 335 So. 2d 5 (Fla. 1976).
135. 362 So. 2d 302 (Fla. 2d DCA 1978).

individual savings into a joint account for the purpose of convenience, rather than to convey a gift, that supported a finding of special equity in favor of the wife for her contribution.

D. *Dower Rights*

No equitable lien or encumbrance may be imposed upon a surviving spouse's dower, for it takes precedence over all other claims to a decedent's estate.[136]

The right to dower may be taken away only by the widow's voluntary consent, by her own act, or by statute.[137]

VI. Property Settlement Agreements

A. *Antenuptial Agreements*

The District Court of Appeal, Second District, has held that the marital misconduct of spouses will not void an antenuptial agreement. Since any future dissolution is likely to be predicated upon some form of misconduct or breach of marital duty, voiding of an antenuptial agreement on such grounds would undermine its purpose and usefulness.[138]

B. *Postnuptial Agreements*

True legal status of the terms of a property settlement agreement incorporated into a final judgment is determined by examining the intent of the parties, according to the court in *Coffin v. Coffin*.[139] Mere labeling of its terms as property does not preclude modification of provisions construed as child support or alimony.

Alimony provisions of a settlement agreement are subject to change without a showing of hardship. Factors such as a change in the spouse's status to self-supporting or a change in the status of minor children also may be considered to justify modification.[140]

Monthly financial payments provided to the wife as part of the property settlement agreement in return for a transfer of her interest in the parties' real property may not be modified.[141]

Similarly, provision for periodic payments under a property settlement agreement may not be modified if it has been bargained

136. *In re* Estate of Donner, 364 So. 2d 753 (Fla. 3d DCA 1978).
137. *In re* Estate of Donner, 364 So. 2d 742, 752 (Fla. 3d DCA 1978).
138. Maloy v. Maloy, 362 So. 2d 484 (Fla. 2d DCA 1978).
139. 368 So. 2d 105 (Fla. 4th DCA 1979).
140. Cambest v. Cambest, 367 So. 2d 686 (Fla. 3d DCA 1979).
141. Coniglio v. Coniglio, 370 So. 2d 86 (Fla. 2d DCA 1979).

for in consideration of a waiver of legal rights in the other spouse's property.[142]

In *Hirsch v. Hirsch*,[143] the parties had entered into a separation agreement, its terms to be governed by New York law. In rendering a final judgment of dissolution, the Florida court increased the lump sum alimony provision in the separation agreement. The court based its modification on a finding of substantial change in circumstances. According to New York law, however, alimony may be modified only if the spouse is likely to become a public charge if support is not increased.[144] Since the wife in *Hirsch* had net assets of $5,000 she did not meet the higher New York standard and the district court reversed the lower court's modification. The modification also was invalid because both Florida and New York proscribe modification of a lump sum award in a property settlement agreement.[145]

In *Bakshandeh v. Bakshandeh*,[146] the trial court vacated a property agreement contained in a final decree of marriage dissolution after finding that the husband had induced the wife by coercion and duress to enter into the agreement. During marriage the husband had urged her to take a medical training program admissions exam in place of her sister. He then used his wife's "indiscretion" to blackmail her into signing the agreement; the wife feared she would lose her own license to practice medicine if the substitution were discovered. Since a property settlement agreement may be set aside when a party has been compelled to enter into it through duress, the agreement was properly stricken.

In *Swad v. Swad*,[147] a postnuptial separation agreement attached to a final judgment was upheld by the trial court, since it was executed voluntarily after full disclosure and was in the best interest of the parties.

VII. Attorney's Fees

A. *Jurisdiction*

A spouse's voluntary dismissal of a dissolution proceeding divests the trial court of power to award attorney's fees thereafter.[148]

142. Fagan v. Lewis, 374 So. 2d 18 (Fla. 3d DCA 1979).
143. 369 So. 2d 407 (Fla. 3d DCA 1979).
144. *Id.* at 408.
145. *Id.* at 409.
146. 370 So. 2d 417 (Fla. 3d DCA 1979).
147. 363 So. 2d 18 (Fla. 3d DCA 1978).
148. Hayden v. Hayden, 373 So. 2d 436 (Fla. 3d DCA 1979).

In this case, the wife had voluntarily dismissed her action for dissolution of marriage and at the same time discharged her attorney before the court made its order determining attorney's fees. The appellate court reversed the judgment for fees, stating that once the action had been dismissed, the trial court lost power to adjudicate the cause in any way. The attorney could recover his fees, however, by filing a separate action.

When a petition for modification does not include a request for attorney's fees, the trial court lacks the authority to award such fees after the time has run for rehearing and appeal on the modification order.[149] According to the District Court of Appeal, Fourth District, the reservation of jurisdiction in the initial final judgment related to past, rather than future attorney's fees.[150]

Unless a party's attorney has claimed a charging lien, the trial court may not require a party to pay his or her attorney's fees.[151] Since a litigant may be placed in an adversarial relationship with his or her own attorney regarding payment of fees, an order of payment made by the court on its own initiative would deprive the party of due process.

B. *Criteria*

The touchstone of an award of attorney's fees is the relative financial position of the parties. In *Sumner v. Tart*,[152] failure to award a wife attorney's fees was an abuse of discretion, given the fact that in contrast to her spouse, the wife lacked any income.

Elements to be considered in fixing the amount of attorney's fees include "services rendered, responsibility incurred, the nature of the services, the skill required, the circumstances under which it was rendered, the ability of the litigant to respond, the value of the services to the client, and the beneficial results, if any, of the services."[153] Thus, in *Gray v. Gray*,[154] the trial court erred in basing its denial of the wife's motion for attorney's fees solely on the ground that the husband had raised a legitimate judicial question in his motion to modify.

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149. McCallum v. McCallum, 364 So. 2d 97 (Fla. 4th DCA 1978) (per curiam). *See also* Adler v. Adler, 365 So. 2d 411 (Fla. 3d DCA 1978).

150. 364 So. 2d at 98.

151. Conroy v. Conroy, 370 So. 2d 1188 (Fla. 2d DCA 1979).

152. 362 So. 2d 344 (Fla. 1st DCA 1978) (per curiam).

153. Dash v. Dash, 363 So. 2d 48 (Fla. 3d DCA 1978) (quoting Pfohl v. Pfohl, 345 So. 2d 371, 379 (Fla. 3d DCA 1971)).

154. 362 So. 2d 294 (Fla. 2d DCA 1978) (per curiam).

Self-serving testimony by a party's counsel as to the value of legal services which he or she has rendered is, by itself, insufficient to support an award of attorney's fees.[155]

The trial court may not award attorney's fees without receiving evidence of the value and nature of the services rendered by the attorney.[156] Thus, although representation of a spouse by the Legal Aid Society was based on a determination by the Society that neither marital partner had the ability to pay, such a finding was not legally binding. The trial court must independently determine the spouse's need and the other party's ability to pay reasonable attorney's fees.[157]

Plaintiff in *In re Estate of Donner*[158] had entered into a contingency fee contract with her attorneys, promising them one-third of whatever she might recover against her late husband's estate. Upon establishment of her right to dower, the trial court awarded a fee based upon the reasonable value of her attorney's services. The Third District upheld the award, reasoning that since the amount of recovery had not been determined finally, a contingency award would be too speculative. In any event, existence of a contingency contract is only one of a number of criteria which may be considered in assessing attorney's fees.[159]

The purpose of awarding attorney's fees is to afford both spouses comparable opportunity to obtain sound representation. Following that rationale, the Fourth District in *Scattergood v. Scattergood*[160] reversed an award of attorney's fees to the wife whose net worth equalled that of her husband and whose yearly income was nearly $20,000.

Similarly, in *Winston v. Winston,*[161] the Third District invalidated an award of attorney's fees to a wife whose present financial situation and prospects for future earnings were better than those of her husband.

In *Diaco v. Diaco,*[162] a wife who herself lacked sufficient funds was compelled to take money from her father to pay attorney's fees. Since an award of attorney's fees depends on the relative

155. Wilson v. Wilson, 362 So. 2d 1030 (Fla. 3d DCA 1978).

156. Pearce v. Pearce, 363 So. 2d 1146 (Fla. 2d DCA 1978) (per curiam).

157. Love v. Love, 370 So. 2d 1231 (Fla. 4th DCA 1979).

158. 364 So. 2d 761 (Fla. 3d DCA 1978).

159. Universal Underwriters Ins. Co. v. Georgei Enterprises, Inc., 345 So. 2d 412 (Fla. 2d DCA 1977).

160. 363 So. 2d 601 (Fla. 4th DCA 1978).

161. 362 So. 2d 149 (Fla. 3d DCA 1978).

162. 363 So. 2d 183 (Fla. 2d DCA 1978).

financial status of the *spouses*, the wife's reliance on her father did not relieve her husband from his obligation to provide reasonable attorney's fees.

VIII. SUPPORT OF CHILDREN

A. *Discovery*

The Third District held that a father's financial status was not discoverable under rule 1.280 of the Florida Rules of Civil Procedure, in a suit brought by him to determine his child support obligations under a settlement agreement incorporated into a final judgment of dissolution.[163] The father had petitioned for a decrease in the amount of child support or, in the alternative, a declaratory judgment concerning whether he was still obligated to pay support for the child while at the same time paying for his college expenses. The court viewed the action as akin to a declaratory judgment rather than a request for modification based on changed financial circumstances, and therefore held that he did not have to produce financial records or answer interrogatories concerning his financial status propounded by his ex-wife.

B. *Financial Affidavits*

In *Seinfeld v. Seinfeld*,[164] a wife's failure to file a financial affidavit did not warrant reversal of an award of child support when the husband had failed to raise the issue at trial or to claim resulting prejudice.

In *Estes v. Estes*,[165] however, the First District struck an award of child support where both attorneys failed to furnish financial affidavits before a child support hearing.

Rule 1.611 of the Florida Rules of Civil Procedure requires filing of financial affidavits before a modification hearing.[166] According to the First District Court in *Nour v. Nour*,[167] however, failure to comply with this rule does not warrant reversal of the modification order when substantial evidence supports the order and no prejudice has ensued.

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163. Heiman v. Heiman, 369 So. 2d 956 (Fla. 3d DCA 1978).
164. 363 So. 2d 19 (Fla. 3d DCA 1978).
165. 373 So. 2d 965 (Fla. 1st DCA 1979) (per curiam).
166. Hagin v. Hagin, 353 So. 2d 949, 952 (Fla. 2d DCA 1978).
167. Nour v. Nour, 373 So. 2d 379 (Fla. 1st DCA 1979).

C. *Out of State Documents*

In *In re Bush*,[168] the First District interpreted section 88.181 of the Florida Statutes[169] as permitting a trial court in one state to send documents regarding child support either to the trial court in Florida or to a state information agency such as the Department of Legal Affairs.

D. *Criteria*

A father's spendthrift trust that expressly permits him to distribute income to support his minor children is a proper asset for consideration in determining the amount of child support, according to the Third District.[170]

An award of thirty dollars per month for two minor children was held an abuse of discretion in *Davis v. Davis*.[171] Prior to dissolution of the marriage, the father had contributed nearly double the awarded amount towards supporting his children, and his present monthly deficit was substantially less than that of the mother and children. On that basis the District Court of Appeal, Second District, increased the award to fifty dollars per month per child.

In *Genoe v. Genoe*,[172] an award of $2,000 of child support per month was held excessive, given the wife's improper inclusion of her own needs in seeking that amount.

In *Bragdon v. Bragdon*,[173] payment of thirty-three percent of a husband's net income towards support of one child was affirmed, since no other monetary award was made to his former wife or to the family.

A state court may not award a parent a federal income tax deduction for payment of child support. Federal tax matters must be decided in light of the Internal Revenue Code and regulations, not according to the provisions of a state court order modifying a marriage dissolution judgment.[174]

An award of mortgage payments may not be labeled child support, because the award provides support for the custodial spouse

168. 371 So. 2d 587 (Fla. 1st DCA 1979) (per curiam).

169. FLA. STAT. § 88.181 (1977) provides that: "[w]hen the court of this state, acting as a responding state, receives from the court of an initiating state the aforesaid copies, it shall docket the cause . . . ."

170. Page v. Page, 371 So. 2d 543 (Fla. 3d DCA 1979).

171. 371 So. 2d 591 (Fla. 2d DCA 1979).

172. 373 So. 2d 940 (Fla. 4th DCA 1979).

173. 363 So. 2d 855 (Fla. 4th DCA 1978).

174. Sumner v. Tart, 362 So. 2d 344 (Fla. 1st DCA 1978).

in addition to benefiting the children.[175]

A child support award based on misrepresentation of a parent's income is subject to reversal.[176]

E. *Modification*

The court may modify child support payments even though the obligation stems from a voluntary property settlement agreement,[177] but a court may not modify child support solely on its own motion.[178] In *Smith v. Smith*,[179] the trial court impermissibly reduced an award of child support because no pleading had requested modification nor was there any indication that evidence produced at the hearing to prove arrearages and ability to pay would be considered by the court as a basis for modification.

A father's voluntary extra contributions to the support of his children do not of themselves establish the children's increased needs which would justify a modification of support.[180]

A finding of some reduction in income during a temporary fourteen month workstrike does not amount to a substantial change of circumstances sufficient to support a husband's petition for modification of child support.[181]

Absent a parent's agreement to support his or her child beyond the age of majority, the court may not award child support to an eighteen year old.[182] Section 743.07 of the Florida Statutes,[183] which, as of 1973, lowered the age of majority to eighteen, is not retroactive.[184] Therefore, under a divorce decree entered prior to 1973, a parent must continue payment until the child reaches the age of twenty-one.[185] In the case of a pre-1973 divorce decree the only way to modify that obligation is to prove that the child has married or become self-supporting or emancipated.[186]

Unless a child remains legally dependent, support terminates

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175. Bragdon v. Bragdon, 363 So. 2d 855 (Fla. 4th DCA 1978). Nor may an award of mortgage payments on a marital home be labeled as rehabilitative alimony. *See* Busch v. Busch, 362 So. 2d 691 (Fla. 4th DCA 1978).

176. Erhardt v. Erhardt, 362 So. 2d 70 (Fla. 2d DCA 1978).

177. Coffin v. Coffin, 368 So. 2d 105 (Fla. 4th DCA 1979).

178. Koken v. Neubauer, 374 So. 2d 49 (Fla. 3d DCA 1979).

179. 363 So. 2d 832 (Fla. 1st DCA 1978).

180. Diaco v. Diaco, 363 So. 2d 183 (Fla. 2d DCA 1978).

181. Burdack v. Burdack, 371 So. 2d 528 (Fla. 2d DCA 1979).

182. Rollings v. Rollings, 362 So. 2d 700 (Fla. 2d DCA 1978).

183. FLA. STAT. § 743.07 (1979).

184. Hoffman v. Hoffman, 371 So. 2d 1061 (Fla. 1st DCA 1979).

185. *Id.*

186. Burgdorf v. Burgdorf, 372 So. 2d 988 (Fla. 2d DCA 1979).

when the child reaches eighteen.[187] Since the pursuit of college study does not demonstrate legal dependence,[188] an award to pay for a child's college education is an impermissible extension of the support period.[189] In *Mohammad v. Mohammad*,[190] however, a husband's voluntary proposal to pay for his children's college expenses became binding once accepted by the trial court. Nevertheless, if the children failed to pursue a college education in good faith, support would not continue after each one reached age eighteen.

F. *Enforcement*

1. SUSPENSION OF VISITATION RIGHTS

A finding of intentional failure to provide child support may warrant suspension of visitation rights.[191] The court, however, may not condition visitation rights on future payment of child support, since at a later time proper justification for nonsupport may exist.[192]

2. LEGISLATION

The revised Uniform Reciprocal Enforcement of Support Act[193] provides for registration of foreign child support orders and for interstate cooperation in exacting the payment of support. The Act facilitates the establishment and collection of child support obligations when the respondent resides in a state other than that of the petitioner. Additionally, the state or any of its political subdivisions may bring an action to recoup owed payments.[194] Support duties, including the duty to pay arrearages, are enforceable by civil or criminal contempt proceedings.[195]

If a respondent defends an action for child support brought under the Uniform Reciprocal Enforcement of Support Act by denying paternity, the court may adjudicate the paternity issue un-

187. Krogen v. Krogen, 320 So. 2d 483 (Fla. 3d DCA 1975).
188. French v. French, 303 So. 2d 668 (Fla. 4th DCA 1974).
189. Kowalski v. Kowalski, 315 So. 2d 497 (Fla. 2d DCA 1975); Coalla v. Coalla, 330 So. 2d 802 (Fla. 2d DCA 1976).
190. 371 So. 2d 1070 (Fla. 1st DCA 1979).
191. Acker v. Acker, 365 So. 2d 181 (Fla. 4th DCA 1978).
192. *Id.*
193. 1979 Fla. Laws ch. 79-383, §§ 1-42 (amending FLA. STAT. §§ 88.011-.345 (1977)).
194. *Id.* § 9 (amending FLA. STAT. § 88.091 (1977)).
195. *Id.* § 10 (amending FLA. STAT. § 88.101 (1977)).

less the defense is patently frivolous.[196] Alternatively, the support hearing may be deferred until a determination of paternity has been made.[197]

IX. Custody of Children

A. *Discovery*

As a matter of due process in the determination of custody, a parent has a right to depose social workers who have conducted a custody investigation, as well as others who have supplied information in such an investigation.[198]

B. *Reference to a Master*

When a trial judge refers a matter to a master, the findings of fact and the recommendations of the master should be adopted by the judge since they are based on firsthand observation of witnesses and evidence.[199] Thus, in *Shaw v. Shaw*,[200] the trial court's reliance on its own determination, rather than on thirty pages of testimony and the master's report regarding custody, was erroneous.

Failure to request child support in a petition to modify custody renders improper the trial court's reliance on a general master's report regarding child support.[201].

C. *Representation*

An award of permanent custody to the father has been upheld although the mother was not represented by counsel at the final hearing.[202] The mother's deliberate refusal to cooperate with her retained attorney and her failure to obtain a replacement when her lawyer was permitted to withdraw indicated that she had forfeited her opportunity to have her day in court.[203]

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196. *Id.* § 25.
197. *Id.*
198. Hill v. Hill, 371 So. 2d 573 (Fla. 1st DCA 1979).
199. Claughton v. Claughton, 347 So. 2d 437 (Fla. 3d DCA 1977).
200. 369 So. 2d 81 (Fla. 3d DCA 1979).
201. Waszkowski v. Waszkowski, 367 So. 2d 1113 (Fla. 3d DCA 1979).
202. Baugh v. Baugh, 365 So. 2d 733 (Fla. 1st DCA 1978).
203. *Id.* at 736.

D. *Criteria*

In *Corvison v. Corvison*,[204] the Third District relied on the "tender years doctrine" to uphold an award of permanent custody to a mother of two minor children. Under section 61.13(2) of the Florida Statutes, parents are entitled to equal consideration in the determination of custody.[205] When other factors are equivalent, however, a mother of a child of tender years should receive major consideration for custody.

Although articulating the continuing force of the tender years doctrine, as well as the presumption that the children of one family should not be separated except for compelling reasons, the Fourth District, in *Miller v. Miller*,[206] upheld an award of split custody. Although both parties were found fit and proper, all other factors were not equal. Hence, the husband was properly awarded custody of the parties' two natural children, while the wife received custody of her other natural child, whom the husband had adopted.[207]

E. *Modification*

Psychiatric testimony, in addition to further testimony that the father could give his children a more stable family atmosphere, supported a change of custody from the mother who intended to move (thereby reducing the father's visitation rights) and to resume working, while sending the children to day care centers.[208]

In *Rosenberg v. Rosenberg*,[209] a change of custody was upheld, since the trial court had found that the child's "nomad type of existence"[210] while in his mother's custody, would be stabilized if he were returned to the custody of his father.

F. *Uniform Child Custody Jurisdiction Act*

In *Detko/Roberts v. Stikelether*,[211] a father who had taken his child from the custody of her mother to Florida, in violation of an Alabama custody order, sought modification of custody in Florida.

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204. 362 So. 2d 323 (Fla. 3d DCA 1978).
205. FLA. STAT. § 61.13(2) (1979).
206. 371 So. 2d 565 (Fla. 4th DCA 1979).
207. *Id.* at 566.
208. Berlin v. Berlin, 369 So. 2d 434 (Fla. 3d DCA 1979).
209. 365 So. 2d 185 (Fla. 3d DCA 1978).
210. *Id.* at 186.
211. 370 So. 2d 383 (Fla. 4th DCA 1979).

The circuit court held that it had jurisdiction of the subject matter and the parties, denied the mother's petition for writ of habeas corpus seeking return of the child to her, and modified the Alabama custody order as to the father's visitation rights. The District Court of Appeal, Fourth District, held, however, that the trial court had erroneously assumed jurisdiction. The father filed his pleadings after Florida's adoption of the Uniform Child Custody Jurisdiction Act,[212] which was designed, according to the court, to eliminate the very kind of "child snatching" behavior evidenced by the father here. Accordingly, the trial court should have declined to exercise jurisdiction.[213]

Using the same rationale, the Third District in *Bias v. Bias*[214] affirmed the jurisdiction of a Florida circuit court since the child's presence in another state was the result of his mother's violation of a Florida custody order.

In *Hofer v. Agner*,[215] a Florida circuit court had awarded the mother custody and the father visitation rights. Subsequently, the mother moved to New York with her children. After a visit by the children to Florida, the father did not permit them to return to New York. Upon the mother's petition to enforce the custody award, the father sought modification in Florida. Although the children's home state was New York, the Florida trial court had jurisdiction under section 61.1308(1)(B) of the Uniform Child Custody Jurisdiction Act.[216] The fact that they had lived for most of their lives and had many relatives in Florida, and that a Florida court had presided over the child custody proceeding from the beginning gave the children the "significant connection" with Florida required by the Act.[217] The court stated, however, that before awarding attorney's fees and costs the court should consider the mother's expense and inconvenience in having to defend this second custody action, to discourage continued custody battles and enhance home stability.[218]

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212. FLA. STAT. § 61.1302-.1348 (1979).

213. 370 So. 2d at 385.

214. 374 So. 2d 64 (Fla. 3d DCA 1979).

215. 373 So. 2d 48 (Fla. 1st DCA 1979).

216. Under the Uniform Child Custody Jurisdiction Act, the Florida court may assume jurisdiction where: "1. The child and his parents, or the child and at least one contestant, have a significant connection with this state, and 2. There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . . ." FLA. STAT. § 61.1308(2)(b) (1979).

217. 373 So. 2d at 51.

218. *Id.*

The overriding policy of the Uniform Child Custody Jurisdiction Act is to avoid jurisdictional competition and conflict with courts of other states. Therefore, once Florida is deemed a convenient forum, no other state has jurisdiction, although Florida can request an out-of-state court for assistance in the determination of custody.[219]

On the other hand, in *Moser v. Davis*,[220] the children's presence in Florida was sufficient to afford a Florida court jurisdiction to modify a custody decree awarded by a North Carolina court. The father had not taken the children away from their Georgia home; rather, the children were present in Florida because they had run away from their mother who had threatened them and treated them violently.

In *Adams v. Adams*,[221] petitioner unsuccessfully sought to invoke the Uniform Child Custody Jurisdiction Act in an intrastate custody dispute. Section 61.1304 of the Florida Statutes expressly provides that application of the Act is limited to interstate custody disputes.[222]

In *Baird v. Baird*,[223] a mother was held not in violation of an Arizona court order since she had brought her child into Florida from Arizona legitimately and the subsequent actions of the Florida court were discretionary under sections 61.1302 to 1348 of the Florida Uniform Child Custody Jurisdiction Act.

G. *Legislation*

In *Wainwright v. Moore*,[224] the Fourth District determined that a female prisoner does not have an absolute right to decide custody of her newborn child. Section 944.24 of the Florida Statutes vests neither the mother nor the Department of Offender Rehabilitation with sole discretion to determine custody of a child born to a prisoner for the first eighteen months of the infant's life.[225] Therefore, the rights of all interested parties, including the

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219. Mort v. Mort, 365 So. 2d 194 (Fla. 4th DCA 1978).

220. 364 So. 2d 521 (Fla. 2d DCA 1978).

221. 374 So. 2d 29 (Fla. 3d DCA 1979).

222. FLA. STAT. § 61.1304 (1979).

223. 374 So. 2d 60 (Fla. 3d DCA 1979).

224. 374 So. 2d 586 (Fla. 4th DCA 1979).

225. The court was construing § 944.24 as it existed prior to its amendment in 1979. The pre-1979 version read as follows:

944.24—Administration of correctional institutions for women.

(2) if any women received by or committed to said institution shall give birth to a child while an inmate of said institution, such child may be retained in the

mother, prison officers, officials, and the state must be assessed in light of the prime consideration of the child's welfare.[226]

As recently amended, section 944.24 provides that a child born to an inmate of a correctional institution is subject to the jurisdiction of the circuit court.[227] Upon petition of the Department of Correction, the mother, or an interested third party, the circuit court will conduct a temporary custody hearing to determine the best interests of the child.[228]

H. *Contempt*

A noncustodial parent was held in criminal contempt by a Florida circuit court for leaving the jurisdiction of the court with her minor daughter following a visitation period.[229] The court, however, neglected to issue an order to show cause prior to its judgment as is required by rule 3.840 of the Florida Rules of Criminal Procedure.[230] In view of the severe sanction of incarceration that attends a finding of criminal contempt, the district court invalidated the contempt order because of the trial court's failure to adhere strictly to the requisite procedures.[231]

I. *Child Visitation Rights*

In *Baker v. Baker*,[232] the District Court of Appeal, Fourth District, held that a noncustodial parent should not be denied visitation rights unless visitation would be detrimental to the child's morals or welfare. Additionally, the court indicated that the final judgment of dissolution should specify whether child visitation rights have been granted or denied, along with the basis of the ruling, in order to assist the appellate court in its review of the visitation decision.[233]

Under current statutory law, grandparents may be awarded visitation rights when the court determines it to be in the

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> said institution until it reaches the age of eighteen months, at which time the Department of Offender Rehabilitation may arrange for its care elsewhere. . . .

FLA. STAT. § 944.24 (1977).

226. 374 So. 2d at 588.

227. 1979 Fla. Laws ch. 79-331 (amending FLA. STAT. § 944.24(2) (1977 & Supp. 1978)).

228. *Id.* § 1.

229. Bukszar v. Bukszar, 368 So. 2d 430 (Fla. 2d DCA 1979).

230. FLA. R. CRIM. P. 3.840.

231. 368 So. 2d at 432.

232. 366 So. 2d 873 (Fla. 4th DCA 1979).

233. *Id.*

grandchild's best interest.[234] Section 61.13 of the Florida Statutes, however, authorizing the award of visitation rights in accordance with the Uniform Child Custody Jurisdiction Act, does not permit grandparents of a minor child to petition for modification of visitation rights.[235] Furthermore, although grandparents may be awarded visitation rights as part of the dissolution proceeding, they may not bring an independent action for visitation rights where no dissolution proceeding is pending.[236] If such rights are awarded, the court may not require that a child be kept within the state in order to afford the grandparents visitation rights.[237] Such limited construction of the statute is designed to protect divorced parents from a multitude of hearings.[238]

X. PATERNITY

The Supreme Court of the United States has upheld a New York statute requiring that illegitimate children who wish to inherit from their fathers by intestate succession must present a declaration of paternity made by a court of competent jursidiction during the life of the father. A majority of the Court in *Lalli v. Lalli*[239] found that the proof requirement did not violate equal protection, because it was substantially related to an important, articulated state interest of "just and orderly disposition of [a decedent's] property."[240] The Court conceived the New York requirement to be merely an evidentiary one. Since there are "peculiar problems of proof"[241] involved in paternal, as opposed to maternal, inheritance by illegitmate children, the state had a legitimate interest in ensuring "the accurate resolution of claims of paternity and [minimizing] the potential disruption of estate administration."[242] The requirement of the New York statute was acceptable because it did not effect a total statutory disinheritance of illegitimates, unlike the Illinois statute struck down as unconstitutional by the Court in *Trimble v. Gordon*,[243] but addressed instead only the more limited issue of the standard of proof neces-

234. FLA. STAT. §§ 61.13(2)(b) (1977), 68.08 (Supp. 1978).
235. Shuler v. Shuler, 371 So. 2d 588 (Fla. 1st DCA 1979).
236. Osteryoung v. Leibowitz, 371 So. 2d 1068 (Fla. 3d DCA 1979).
237. FLA. STAT. § 61.13(2)(b) (1979).
238. 371 So. 2d at 590.
239. 439 U.S. 259 (1978).
240. *Id.* at 268.
241. *Id.*
242. *Id.* at 271.
243. 430 U.S. 762 (1977).

sary to establish paternity.

In dissent, Justice Brennan asserted that the majority's decision was actually a disturbing truncation of the Court's earlier holding in *Trimble*.[244] According to his reading of *Trimble*, the Court had held that state interests were adequately satisfied by requiring an illegitimate to offer only a formal acknowledgement of paternity.[245] Justice Brennan noted that public acknowledgement of parentage by the father in *Lalli* satisfied the criterion previously established by the Court in *Trimble*. The majority, however, stated that the statute at issue in *Trimble* was unconstitutional because of its combination of requirements that the father must have acknowledged paternity *and* legitimized the child by marrying the mother, thus creating a total bar to intestate inheritance by children not so legitimized. The New York statute could be distinguished because it created no such bar.[246]

In a Florida case, on the other hand, the First District held that a defendant's letter to the mother which expressly acknowledged paternity was sufficient to sustain a finding of parentage.[247]

In *Roe v. Macy*,[248] the only defense proffered by the putative father was that the wife may have become pregnant as a result of having had sexual relations with another named man. Because blood tests excluded the possibility of parentage by the named individual, however, the ruling, which denied a finding of paternity, went against the manifest weight of the evidence.

The Second District declined to compel the putative father to undergo a new type of blood test which allegedly provides affirmative proof of paternity.[249] To date, only blood tests excluding paternity have been recognized by the Florida courts.[250] Chief Judge Grimes, specially concurring, left open the possibility, however, that where good cause is shown—such as the fact that a baby's blood type is rare—a motion to compel an affirmative blood test might be granted.[251]

The strong presumption of legitimacy of a child born in wed-

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244. 439 U.S. at 277 (Brennan, J., dissenting).

245. *Id.*

246. *Id.* at 273 (Powell, J., for the majority).

247. State Dept. of Health & Rehab. Servs. v. Jackson, 368 So. 2d 960 (Fla. 1st DCA 1979).

248. 363 So. 2d 616 (Fla. 1st DCA 1978).

249. Simons v. Jorg, 375 So. 2d 288 (Fla. 2d DCA 1979).

250. *Id.* at 289.

251. *Id.* at 394.

lock was overcome in *Hill v. Parks*.[252] Although the mother was married at the time of conception, uncontradicted evidence demonstrated that she had not lived with nor had sexual intercourse with her husband for over seven years, and that the defendant had been the only man with whom she had had sexual relations during the relevant period.

In *Estanislao v. State*,[253] a mother brought a paternity suit under chapter 742 of the Florida Statutes, seeking to establish defendant's parentage and child support. The defendant was personally served pursuant to section 48.193(1)(e) providing for service in "independent action[s] for support of dependents."[254] The putative father contended that a paternity action is distinct from an independent action for child support and hence that service was defective. The First District rejected the father's assertion, citing the express language of chapter 742: "This chapter shall be in lieu of any other proceeding provided by law for the determination of paternity and support of children born out of wedlock."[255]

XI. ADOPTION

In *Caban v. Mohammad*,[256] the Supreme Court of the United States invalidated a New York statute permitting unwed mothers, but not unwed fathers, to block adoption by withholding consent. Since the gender-based distinction bore no substantial relation to an important state interest, the statute violated the equal protection clause of the fourteenth amendment. The Court rejected the mother's claim that a natural mother always bears a closer relationship with her child than does a natural father.[257] The Court noted that the family had lived together for several years, during which time the father had established a close bond with his children and had admitted paternity.[258] Therefore, the state could not support the gender-based distinction by pointing to any difficulty in identifying the father of this illegitimate child.[259]

252. 373 So. 2d 376 (Fla. 2d DCA 1979).
253. 368 So. 2d 677 (Fla. 1st DCA 1979).
254. FLA. STAT. § 48.193(1)(3) (1979).
255. 368 So. 2d at 678.
256. 441 U.S. 380 (1979).
257. *Id.* at 388.
258. *Id.* at 393.
259. *Id.*

A. *Criteria*

In *Nelson v. Herndon*,[260] the First District reversed an adoption order where the prospective adoptive parents failed to show abandonment by the child's natural parent. No abandonment by the child's father was demonstrated; thus, under section 63.072 of the Florida Statutes parental consent was required in order to grant adoption.[261] Since the father objected, adoption was impermissible. Judge Miller, specially concurring, was reluctant to join in the reversal because the record indicated by clear and convincing evidence that the best interests of the child would be served by adoption. He suggested that the state legislature consider amending section 63.072 to include "the best interests of the child" as an additional circumstance that would excuse the need for parental consent to adoption.[262]

In *In re Adoption of King*,[263] a petition was brought on the grounds of abandonment to adopt a child over the objection of the natural father. The father had failed to pay adequate child support during the period in which the child was not in his physical custody and had failed to visit the child in the home of the would-be adoptive parents. Since the father was unemployed and lacked sufficient funds, however, the court held that abandonment was not established by clear and convincing evidence.[264]

Failure to pay child support did not constitute abandonment justifying adoption, when the mother had concealed the child's whereabouts from the father.[265] In this case the father had failed to pay child support for seventeen months prior to the adoption proceeding initated by the mother and stepfather. Since the mother had moved three times during that period without telling the father, the court found no evidence of abandonment and reversed the trial court's order of adoption.

B. *Evidentiary Requirements*

The trial court relied on records of prior proceedings in granting the petition for adoption in *In re Adoption of Davis*.[266] These records, which included a final judgment of dissolution granting

260. 371 So. 2d 140 (Fla. 1st DCA 1979).
261. FLA. STAT. § 63.072 (1979).
262. 371 So. 2d at 141.
263. 373 So. 2d 384 (Fla. 4th DCA 1979).
264. *Id.* at 385.
265. Barrett v. Reed, 363 So. 2d 14 (Fla. 1st DCA 1978).
266. 369 So. 2d 89 (Fla. 1st DCA 1979).

the mother custody, an order prohibiting visitation by the father, and psychiatric reports regarding the father, were not introduced formally into evidence. The order of adoption was reversed on appeal, the First District ruling that where records of prior separate proceedings were relied upon but not introduced in evidence, the order could not be upheld.

C. *Legislation*

Although records of all custody and adoption proceedings are confidential, a family medical history may be furnished to the adopting parents and to the adopted person at his or her request upon reaching the age of majority. To protect confidentiality of the natural parent, however, no names may be listed in the family medical history.[267]

The legal relationship between an adopted child and a natural parent married to the adopting party does not change with the order of adoption.[268]

XII. Dependency Proceedings

A declaration of dependency pursuant to a proceeding brought by the state on behalf of a minor may permanently deprive the child's parents of custody. The state, therefore, must prove dependency according to a stringent standard of "clear and convincing evidence."[269]

A parent is entitled to representation by counsel at a custody proceeding brought by the state.[270] When long term separation becomes a "very real possibility," due process mandates that a parent be apprised of her right to counsel; if indigent, she must be supplied representation at state expense. Any waiver of counsel must be intelligently made.[271]

In *In re Peterson*,[272] the juvenile division judge improperly dismissed a dependency petition on the grounds that a judge of the same circuit had previously entered an order regarding the child's custody and had reserved jurisdiction of the matter. Jurisdiction over the welfare and custody of children resides in the circuit court

267. Fla. Stat. §§ 63.022(j), 63.082, 63.162(5) (1979).
268. 1979 Fla. Laws ch. 79-369.
269. *In re* C.K.G., 365 So. 2d 424, 425 (Fla. 2d DCA 1978).
270. *In re* R.W.H., 375 So. 2d 321 (Fla. 2d DCA 1979).
271. *Id.* at 323.
272. 364 So. 2d 98 (Fla. 4th DCA 1978).

itself. Jurisdiction is not retained by any individual circuit judge, but rather exists in any judge at the circuit level.

A parent may not be charged with neglect for failing to provide his or her child medical treatment on account of the parent's religious beliefs, because section 827.07 of the Florida Statutes, as amended, recognizes the legitimate practice of a parent's religious beliefs as an exception to neglectful, abrasive "harm."[273] The statute, however, states that this

> exception shall not preclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician . . . or treatment by a duly accredited practioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization.[274]

XIII. Foster Care

In *Williamson v. State*,[275] a ten-year-old child removed from his mother's custody had been placed with a foster family living outside Florida. Since the Florida Department of Health and Rehabilitative Services lacked authority to supervise the foster family, the district court held that the placement was improper. The court stated that a foster home is not a permanent custodial change, but rather a means of preparing the child for returning to his or her natural parents. Thus, if the child should be continued in foster care, she must be placed in a home within Florida, so that the mother may exercise reasonable rights of visitation.[276]

XIV. Family Immunity Doctrine

A. *Interspousal Immunity*

In *West v. West*,[277] a petitioner brought suit against her former spouse for permanent injuries inflicted while the parties were married. Since the Supreme Court of Florida had reaffirmed the doctrine of interspousal immunities in *Bencomo v. Bencomo*,[278] the Second District affirmed dismissal. The appellate court noted,

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273. 1979 Fla. Laws ch. 79-203, § 2 (amending Fla. Stat. § 827.07 (1977 & Supp. 1978)).

274. *Id.* (amending Fla. Stat. § 39.01(27) (1977 & Supp. 1978)).

275. 369 So. 2d 660 (Fla. 1st DCA 1979).

276. *Id.* at 662.

277. 372 So. 2d 170 (Fla. 2d DCA 1979).

278. 200 So. 2d 171 (Fla. 1967).

however, that abrogation of the doctrine under the circumstances of *West* might reduce physical abuse, since an injuring party would then be aware of the likelihood of prosecution after the marriage. The court certified the following question to the supreme court: "Whether a former spouse can maintain an action against another spouse for an intentional tort allegedly committed during marriage, where such marriage has been dissolved by divorce?"[279]

Under recent legislation, the circuit court may issue a restraining order on petition of an abused spouse without requiring the spouse's representation by an attorney. The Department of Health and Rehabilitative Services has been charged with the responsibility of inspecting and prescribing services for state-funded spouse abuse centers.[280]

B. *Parent-Child Immunity*

In *3-M Electric Corp. v. Vigoa*,[281] parents named 3-M as co-defendant in a personal injury suit alleging 3-M's negligence in failing to remove a piece of pipe protruding from the ground in the backyard of the family's new home. 3-M Electric Corporation sought contribution against the parents, asserting their negligence in caring for the child. The Third District considered the applicability of the Uniform Contribution Among Tortfeasors Act in light of the common law doctrine of family immunity. The court noted that the law of contribution among joint tortfeasors is designed to apportion payment of injured third parties among those causing the damage. In order to protect family harmony and resources, a parent is immune from liability for torts that arise within the family unit.[282] Since the family immunity doctrine bars parental liability in such a situation, the parents could not be considered joint tortfeasors with 3-M Electric Corporation.[283]

In *Florida Farm Bureau Insurance Co. v. Government Employees Insurance Co.*,[284] a passenger in a car driven by her husband brought a personal injury suit against the driver, the owner of the other car, and that owner's insurer. The defendants in turn counter-claimed against the husband and his insurer. The court found the driver ninety-percent negligent and the wife's husband

279. 372 So. 2d at 172.
280. 1979 Fla. Laws ch. 79-402.
281. 369 So. 2d 405 (Fla. 3d DCA 1979).
282. *Id.* at 407.
283. *Id.*
284. 371 So. 2d 166 (Fla. 1st DCA 1979).

ten-percent negligent. After paying the wife on behalf of the driver and the owner, the owner's insurer filed a third party complaint against the husband and the husband's insurer, seeking contribution. The husband's insurer denied coverage based on a family exclusion clause in the policy.

The First District held that the family exclusion clause did not bar recovery of the third party contribution claim in this case.[285] The court found that prior judicial abrogation of the interspousal immunities doctrine for contribution claims[286] had undercut policy reasons supporting such clauses, rendering them contrary to public policy. The rationale for such clauses and for the interspousal immunities doctrine, to protect an insurer from direct, collusive lawsuits between family members, does not apply in the context of a third-party action for contribution from a party found responsible by a jury for a portion of the damages suffered by the other member of his family.[287] The traditional policy underlying interspousal immunity—protection of family harmony and resources—is similarly inapplicable in a third-party action for contribution.[288]

Additionally, the court found that the common law interspousal immunities doctrine would not control over the Uniform Contribution Among Tortfeasors Act to prevent one tortfeasor from seeking contribution from another tortfeasor simply because the other is a spouse of the injured party. Since no controlling authority exists on the point, however, the Third District certified the question to the Supreme Court of Florida as follows: "Does a family exclusion clause in an automobile liability insurance policy control over the Uniform Contribution Among Tortfeasors Act to prevent one tortfeasor from seeking contribution from another when the other is the spouse of the injured person who has received damages from the first tortfeasor?"[289]

XV. WRONGFUL DEATH

In *Whitefield v. Kainer*,[290] an illegitimate child born nine months after the putative father was killed in a motorcycle accident sought recovery under the Florida Wrongful Death Statute. There was no evidence that the putative father knew of the

285. *Id.* at 167.
286. Shor v. Paoli, 353 So. 2d 825 (Fla. 1977).
287. 371 So. 2d at 167.
288. *Id.*
289. *Id.*
290. 369 So. 2d 684 (Fla. 4th DCA 1979).

mother's pregnancy or had recognized any responsibility for the child's support. The Fourth District upheld denial of recovery. Although a "survivor" entitled to recovery under section 768.18(11) of the Florida Wrongful Death Statute includes a mother's illegitimate child, it does not signify an illegitimate child of a father *unless* the father has recognized a responsibility for the child's support.[291]

In *Grant v. Sedco*,[292] a wrongful death action was brought on behalf of a child who had been given by its natural mother to the deceased when the child was three days old. The deceased failed to adopt the child legally. Reasoning that equitable adoption merely enforces a contract right and does not establish the creation of a parent-child relationship, the court held that an equitably adopted child may not recover in a wrongful death action.[293]

291. *Id.* at 685.
292. 364 So. 2d 774 (Fla. 2d DCA 1978).
293. *Id.* at 775.